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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1958

NO. 291

MURRAY WHITFIELD COULTER and
GEORGE PROTHRO COULTER ..... Appellants

V.

GARLAND ANTHONY, FAY FURLOW, JAMES ABBOTT, FURLOW-ABBOTT COMPANY, a Corporation, RUTH JONES PUDEPHATTE, LIZZIE LOU JONES PUDEPHATTE, JAMES DAVID JONES, WILLIAM R. ARENDT, EUGENE F. GALLOWAY, EDWIN WILSON ANTHONY, LOUISE J. ANTHONY, E. H. GILL and M. B. GARRISON ..... Appellees

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARKANSAS

MOTION TO DISMISS

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ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARKANSAS

MOTION TO DISMISS

Appellees move to dismiss the appeal herein on the grounds;

(1) That the appeal does not present a substantial federal question; (2) That the judgment rests on an adequate non-federal basis.

OPINION BELOW

The opinion of the Arkansas Supreme Court from which comes this appeal appears in appellants' Jurisdictional Statement as Exhibit A-3, (p. 16). The opinion on rehearing, Exhibit A-5 (p. 27). Judgment in Substitution, Exhibit A-6, (p. 28).

QUESTIONS PRESENTED

The questions presented in this appeal are:

(1) Whether the sale of the lands by the Sheriff for non-payment of taxes was void, and whether the sale, if void, was cured by Act 142 of the 1935 Session of the Arkansas Legislature.

(2) Whether the sale of the lands by the Sheriff for non-payment of taxes was void because the lands, at the time of the sale, were assets in the hands of the trustee in a Court of Bankruptcy.

(3) Whether the operation and effect of Act 142 of 1935, violates the provisions of the Fourteenth Amendment to the Constitution of the United States.

(4) Whether the sale of six, forty-acre parcels, in three lots of eighty acres each, was without statutory authority and in contravention to the provisions of Section Five of Article Sixteen of the Constitution of Arkansas and to applicable decisions of the Supreme Court of the United States.

STATUTES INVOLVED

Act 142 of 1935. Approved March 20, 1935.
Jurisdictional Statement, Ex. B-6 (p. 38)

Act 264 of 1937. Approved March 13, 1937.
Jurisdictional Statement, Ex. B-7 (p. 39)
Ark. Statutes 1947. Sec. 84-415
(Act 172 of 1929)
Ark. Statutes 1947. Sec. 84-447
(Act. 172 of 1929)
Ark. Statutes 1947. Sec. 84-802
(Crawford & Moses Digest 10010)
Ark. Statutes 1947. Sec. 84-807
(Act No. 16, Extra Session 1933)
Ark. Statutes 1947. Sec. 84-901
(Crawford & Moses Digest 10026)
Ark. Statutes 1947. Sec. 84-913
(Crawford & Moses Digest 10066)
Crawford & Moses Digest, Sec. 10023
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Crawford & Moses Digest, Sec. 10096
Ark. Statutes 1947. Sec. 84-1301
(Crawford & Moses Digest - 10108)
Ark. Statutes 1947. Sec. 84-1302
(Crawford & Moses Digest - Sec. 10109)
Ark. Statutes 1947. Sec. 84-1314
(Crawford & Moses Digest - Sec. 10112)
Ark. Statutes 1947. Sec. 10-925
(Crawford & Moses Digest - Sec. 6682)

STATEMENT OF THE CASE

The particular lands involved in this appeal were listed in the assets of Harris Bros., adjudged a bankrupt on January 23, 1932. The lands were conveyed by the Trustee in Bankruptcy to Prothro, August 17, 1933. Appellants claim under a deed from Prothro. Appellees' predecessors

in title received tax deeds from the Commissioner of State Lands for the State of Arkansas, on November 25, 1935, and March 26, 1936. By Statute, (Sec. 10-925, Ark. Statutes 1947, Sec. 6682, Crawford & Moses Digest) these deeds are prima facie evidence of title.

The lands were sold in June, 1932, by the Sheriff for non-payment of taxes, to the State, for the taxes assessed and levied and extended in 1931. The state's lien for taxes attached on the first Monday in June, 1931. (Act of March 24, 1911. Crawford & Moses Digest, Sec. 10023). The lands were subject to redemption during a period of two years after June, 1932, (Crawford & Moses Digest, Sec. 10096) and not having been redeemed were certified by the Clerk to the State Land Commissioner (Ark. Statutes, 1947, Sec. 84-1314, Crawford & Moses Digest, 10112).

The Arkansas Constitution, Section 5 of Article 16, provides: "No tax shall be levied except in pursuance of law." The procedure for assessing, levying and collecting taxes is provided by Statutes, as well as the procedure for selling lands for non-payment of taxes.

Prior to the passage of Act 142 of 1935, the Courts had consistently declared sheriffs' sales of land for delinquent taxes to be void for irregularities or omissions occurring in assessing the lands and in the preparation of the tax books and in the advertising and sale of the lands.

Act 142 was designed to prohibit the Courts from setting aside tax sales on account of any such irregularity, informality or omission of any officer in connection with the assessment, levying of taxes, filing and recording of the de-

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In 1931, 1932 and 1933 Crawford & Moses Digest was the official Digest of Arkansas Statutes.

linquent list and published the notice of sale, etc. Act. 142 was repealed in 1937, but in Wood v. Lovett, 85 U. S. L. Ed. 1404. 313 U.S. 362 it was held that the act was operative as to lands sold by the State Land Commissioner while the act was in effect.

The tax sale occurred while these lands were assets of the bankrupt in the hands of the trustee. No claim for taxes was filed in the Bankruptcy Court, and no action was taken by the Trustee to prevent the sale of the lands for the delinquent taxes. Instead, when the Trustee had under consideration the sale of these lands to Prothro the delinquent taxes were considered, and the decision of the Trustee was to sell the lands subject to the outstanding taxes. At the time the lands were sold on August 17, 1933, the purchaser still had until June, 1934, to redeem the land by payment of the taxes due, plus interest, and the cost of the sale.

When the lands were sold for taxes, certain tracts which had been assessed as six separate forty acre parcels were combined and sold as three eighty acre tracts. The amount of the total tax was the same, and the cost of the sale was less by combining the tracts in that manner, and the land owner suffered no ill advantage.

ARGUMENT

No Substantial Federal Question is Presented

The federal questions on which appellants rely relate to: (1) Whether the tax sale was void because the lands were in custodia legis. (2) Whether the tax sale was void on account of jurisdictional defects in the sale as distinguished from irregularities and omissions.

CUSTODIA LEGIS

The mere fact that these lands were assets in the hands of the trustee in bankruptcy, and to that extent were in custodia legis, does not render the tax sale void. The bankruptcy court has adequate authority to protect the property that comes into its custody, and also has great flexibility in disposing of such property. If the possession of the trustee is interfered with, the Court has authority to enjoin such interference. In the case of tax sales the bankrupt court, on notice and after a hearing, can cancel the lien for taxes and require that claims for the taxes be filed in the bankrupt court. This is the procedure that must be followed where land subject to the State's tax lien is sold, free of liens. On the other hand the bankrupt court may sell the lands subject to the tax lien, in which case the bankruptcy court disclaims all responsibility for the taxes and the taxing authority may resort to foreclosure of its tax lien. U.S.C.A. Title 11, Bankruptcy Sec. 110, Note 1387, Incumbered property. Cases cited.

This is the effect of the decisions in Dayton vs. Stanard 241 U. S. 588 Eppstein vs. Orahood, 156 Fed. 42, 17 L.R.A.-NS, 465.

The enforcement of the State's lien for taxes in Arkansas is not like that of many states where direct action is necessary to enforce the tax lien. In this case the State's lien for taxes attached the first Monday in June, 1931. (Crawford & Moses Digest, Sec. 10,023). This was prior to the adjudication in bankruptcy. The tax sale was held in June, 1932, but no title passed under the tax sale until two years later, when the time for redemption had expired, and the lands were certified by the Clerk to the State Land Commission. Ark. Stats. 1947, Sec. 84-1314;

Crawford & Moses Digest, Sec. 10112; Crawford & Moses Digest, 10096.

A sale by a trustee in bankruptcy is a judicial sale, and the purchaser is bound to know that all that the receiver or trustee sells is his right, title and interest, and the purchaser takes subject to outstanding liens and interests unless they were divested by an order of sale, free of liens. The liability, as between the trustee in bankruptcy and the purchaser at a sale made by him, for taxes accruing during the pendency of the administration of the bankrupt's estate, depends upon the terms of the sale. 6 Am. Jur., P. 1272, Bankruptcy Sec. 1210; Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 75 U. S. L. Ed. 645, Annotation p. 651.

The bankruptcy court has the power to order the sale of assets of the estate in the custody of the Court, subject to existing liens. This would transfer to the purchaser the interest of the estate, only leaving it to the purchaser to contest the claims of third persons.

A Court or bankruptcy has authority to order a sale by the trustee, free and clear of all liens and encumbrances, with provisions for the transfer of liens to the proceeds of the sale. 6 Am. Jur., P. 1274, Bankruptcy Sec. 1213, 1214, 1215.

In his findings, the Chancellor who tried the case, referred to the minutes of the Referee in Bankruptcy, dated July 12, 1933, and quoted the following statement: "There is a cloud on the title and there are a lot of past due taxes, amounting to some thousand dollars that have got to be paid", and continued, "the lands will be sold subject to all that. I do not see any other way it could be handled except to sell what ever right or title the trustee had." (Appellants brief, Appendix A, P. 7). If the sale of these

lands to Prothro by the trustee was intended to be free and clear of liens, it would have been necessary to notify the State and to provide for the payment of taxes out of funds in the bankruptcy Court. In re Reading Hat Manufacturing Company, 224 Fed. 786, and Wiswell vs. Sampson, 14 HOW. 52 (1852). In re Pennsylvania Central Brewing Company, 135 F. 2d, P. 60.

Without any question the record shows that the lands were sold subject to the tax lien, and that only the trustee's equity passed under the sale. This appears from the minutes of the Referee at pages 184 through 198 of the transcript. The trustee's Report of Sale recited that the trustee had an offer of "$2500.00 in cash from E. W. Prothro for the equity of the trustee in the remaining assets". These assets were stated by the trustee to include: "All real property of the bankrupt subject to the delinquent taxes now against the same". The trustee was ordered to convey to E. W. Prothro "all the right, title and interest of the trustee for the estate of Harris Brothers ..." and to all of the real property of the estate ... but subject to delinquent taxes as adverse claims, said real estate being specifically described as follows:" (Original Tr. 292).

The Arkansas Supreme Court, in its opinion discussing the question of whether the tax sale interfered with the bankruptcy court's control of the property, said: "In the Harris Bros. matter, the bankruptcy court made no effort to set aside the collector's sale. To the contrary, the order authorizing the trustee's sale to Prothro expressly made it subject to the delinquent taxes against the land. It is quite apparent that the tax sale did not interfere, in any way, with the bankruptcy court's control of the property."

The fact that the property was sold by the bankrupt court subject to the lien for taxes, eliminates completely

the federal question, so far as the subject of custodia legis is concerned.

VALIDITY OF TAX SALE

Jurisdictional Defects as Distinguished from Irregularities and Omissions

Before the passage of Act 142 of 1935, the Arkansas Courts would have held a tax sale to be void if it could be shown that there were any irregularities, omissions or jurisdictional defects involved. While Act 142 was in effect the Courts were prohibited from voiding tax sales for mere irregularities or omissions, but when jurisdictional defects were proven, the sale would be declared void. (Cecil vs. Fisher, 206 Ark. 962; 178 S.W. 2d, 655; Sanderson vs. Walls, 200 Ark. 534; 140 S.W. 2d, 655; Burbridge vs. Crawford, 195 Ark. 191; 112 S.W. 2d, 423.

The distinction between jurisdictional defects and irregularities and omissions has not always been easy. The inclusion of an unauthorized tax would be jurisdictional, as would the complete failure to publish the notice of sale; but the failure of the Clerk to make his certificate of publication before the day of sale is a mere irregularity. (Carle vs. Gehl, 193 Ark. 1061; 104 S.W. 2d, 445; Foster vs. Reynolds, 195 Ark. 5; 110 S. W. 2d, 689; Wallace vs. Todd, 195 Ark. 134; 111 S.W. 2d, 472; Lumsden vs. Erstine, 205 Ark. 1004; 172 S. W. 2d, 409)

The irregularity in the sale for taxes complained of by appellants is that the Clerk failed to record the notice of sale and attach his certificate to the delinquent tax list before the day of sale. The Courts have repeatedly held that this is a mere irregularity or omission, and not a jurisdictional defect.

The determination of matters of this kind does not present a Federal question.

THE SALE OF THE LANDS IN PARCELS OF EIGHTY ACRES INSTEAD OF FORTY ACRE TRACTS

The combining of two forty-acre tracts into one eighty-acre tract for the purpose of sale was not a jurisdictional defect, but was merely an irregularity which was cured by Act 142. Sec. 9 of Act 172 of 1929 (appellant's brief, Exhibit B-13) cited by appellant, relates only to the preparation of the real estate book for use by the assessor. Under the law, the separate parcels listed in that book are valued or assessed by the assessor. This book is returned to the Clerk and from it, the Clerk makes up the tax books. But where the ownership is the same and values are the same, the Clerk may combine the parcels and extend the taxes against the whole tract. Sec. 1 of Act 72 of 1931 (appellant's brief, Exhibit B-14) is cited by appellants to support their contention that the assessment was defective, but appellants neglected to set out in their Exhibits B-13 and B-14 one paragraph in the sections from which they quote. The omitted paragraph reads: "No failure to observe any of these requirements shall be held to vitiate any assessment if the lands be so described as to be identifield." (Sec. 1 Act 72, 1931; Sec. 9, Act 172, 1929.)

The Arkansas Supreme Court, in its opinion, held that the act of the Clerk in combining the 40 acre tracts, for the purpose of extending the tax, and the sale of the tracts in 80 acre parcels was only an irregularity and was cured by Act 142 of 1935. The Court's reasoning is quite sound.

The cases cited contra by appellants, Cocks vs. Simmons, 55 Ark. 104; Harris vs. Brady, 87 Ark. 428; Dansby

vs. Weeks, 199 Ark. 497; deal with a state of facts entirely different, and have no application.

CONSTITUTIONAL QUESTIONS

The constitutional question was raised for the first time in the petition for re-hearing, but that question has already been settled in Woods vs. Lovett, 313 U.S. 362. In that case it was held that notwithstanding the repeal of Act 142 by the Legislature in 1937, it constituted a bar to any action to set aside a sale for taxes on account of irregularities, when the lands were sold by the state while Act 142 was in effect.

It has already been recognized and conceded in the State court that some of the land that was sold by the trustee in bankruptcy is open to attack because of irregularities in the sale for taxes, but that land was sold by the State Land Commissioner after Act 142 of 1935 was repealed, and was not afforded the protection that attached with respect to the lands involved in this appeal. The State Supreme Court reversed the trial court as to the one tract not cured by Act 142 and remanded the case to the Chancery Court for further proceedings with respect to that tract. (Appellant's Exhibit A-6, Jurisdictional Statement).

Attention should be directed to the comments on Judge Miller's decision (Exhibit A-7, Jurisdictional Statement). This decision makes no mention of Wood vs. Lovett, and it does not appear that the order of the bankruptcy court selling these lands, subject to the tax liens, was brought to the attention of the Court. We do not know what Judge Miller's decision would have been had these things been called to his attention.

CONCLUSION

The constitutional question relating to application of Act 142 of 1935, which presents the only substantial federal question in the case, has been foreclosed by the former decision of this Court in Wood v. Lovett. King v. West Virginia, 216 U. S. 92; 54 L. Ed. 396; Equitable Life Assurance Society v. Brown, 187 U. S. 308; 47 L. Ed. 190.)

The decision of the state court rests upon non-federal ground adequate to support the decision. (U.S.C.A. Title 28, Sec. 1257, Note 62; Utley v. City of St. Petersburg, Fla., 292 U.S. 106; 78 L. Ed. 1155; Arkansas Southern R. Co. v. German National Bank (Ark.), 207 U.S. 270; 52 L. Ed. 201).

The decisions of the state court construing the statutes regulating the assessment, levy, and collection of local taxes are binding on the Supreme Court of the United States. (U.S.C.A. Title 28, Sec. 1257. Cases cited in notes 63, 64 and 65.)

Since the constitutional question has already been decided and there is no other substantial federal question involved, and the decision of the State Supreme Court is based on non-federal questions, the motion to dismiss should be sustained.

Respectfully submitted,

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